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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

ADRIAN L. GRASS, ADRIAN L. GRASS, JR.,
SHARON ELIZABETH GRASS AND
RAMONA REBECCA LOPEZ,
Petitioners,

vs.

CREDITO MEXICANO, S.A., a/k/a
CREDITO MEXICANO, S.N.C.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the situs analysis used to determine applicability of the act of state doctrine should be abandoned.

LIST OF PARTIES

The Petitioners are:

ADRIAN L. GRASS,
ADRIAN L. GRASS, JR.,
SHARON ELIZABETH GRASS and
RAMONA REBECCA LOPEZ,

The Respondent is:

CREDITO MEXICANO, S.A., a/k/a
CREDITO MEXICANO, S.N.C.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE UNITED STATES SUPREME COURT:

Come now the Petitioners, Adrian L. Grass, Adrian L. Grass, Jr., Sharon Elizabeth Grass and Ramona Rebecca Lopez, and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 797 F.2d 220, and is reprinted in the appendix hereto, (page la, *infra*). The memorandum decision of the United States District Court for the Western District of Texas (Bunton, D.J.) has not been reported. It is reprinted in the appendix hereto, (page 8a, *infra*).

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1986. A petition for rehearing was denied on September 15, 1986. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §1331 and §1332. In the alternative, jurisdiction was invoked pursuant to 28 U.S.C. §1330 of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611.

In 1976, Mario Lozoya Muniz, the general manager for Inversiones Bursatiles Mexicanas, S.A., the predecessor to Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C., delivered information regarding financial services and investments in dollar accounts in Mexico to Petitioner, Adrian L. Grass, at his office in El Paso, Texas. Subsequent to the delivery of this information, Petitioner Adrian L. Grass had conversations with Mr. Lozoya at Dr. Grass' office in El Paso, and finally began investing and receiving financial services in July, 1976.

Petitioner, Adrian L. Grass, since July, 1976, has invested in dollar accounts with Inversiones Bursatiles Mexicanas, S.A., and its successor, Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C. These investments have been made for both the personal account of Adrian L. Grass, Adrian L. Grass, Jr., and Sharon Elizabeth Grass, and for the Adrian L. Grass Professional Association Employee Retirement Plan, consisting of Petitioners Adrian L. Grass and Ramona Rebecca Lopez. The investments and financial services were purchased in El Paso, Texas.

On or about July 26, 1982, in El Paso, Petitioners purchased six-month certificates of deposit from an agent of Credito Mexicano, S.A. Adrian L. Grass and Ramona Rebecca Lopez invested $280,690.62 with Respondent for the Adrian L. Grass Professional Association Employee Retirement Plan. Adrian L. Grass, Adrian L. Grass, Jr., and Sharon Elizabeth Grass, invested $141,637.25 with Respondent. These investments were made for a six-month period, were denominated in American dollars, and were to yield 15.31% annual interest.

Prior to the sale on or about July 26, 1982, Respondent, by and through its agents, Mario Lozoya Muniz and Marta Rodriguez, misrepresented to Petitioners that the dollar accounts were still a stable and wise investment, that the accounts were "fantastic" and that Petitioners had nothing to worry about regarding Peso fluctuations. On the basis of these misrepresentations as made in El Paso, Texas, Petitioners decided to continue their investment with Respondent in the dollar accounts in the summer of 1982.

In August, 1982, Respondent began to pay interest on the accounts in pesos by converting the dollars into pesos at the rate of 70 pesos to the dollar, an artificial rate substantially below the exchange rate in international markets, and in direct contravention of the certificate of deposit agreement and oral representations made by Respondent. On February 1, 1983, Plantiffs withdrew all money from the Respondent bank. At this time, in contravention of the agreement, oral and written representations, the dollar accounts were converted into pesos at an adverse rate of exchange. Respondent's agents assured Petitioners that the bank would take care of converting the pesos into dollars. Subsequently, Respondent arranged to convert the pesos into dollars at an exchange rate of 150 pesos to the dollar, resulting in a tremendous loss of principal to Petitioners. The above-recited facts must be taken as true inasmuch as this is a review of an action dismissed for failure to state a claim.

Petitioners' first amended complaint is reprinted in the appendix hereto and sets forth the following federal and state law causes of action: (1) sale of unregistered securities in contravention of 15 U.S.C. §77e; (2) fraudulent misrepresentations and omissions in the sale of securities, 15 U.S.C. §§77e(2), 77q(a), 78j(b); 17 C.F.R. §240.10-b5; (3) negligent misrepresentations; (4) breach of contract; (5) deceptive trades practices, Texas Business and Commerce Code Annotated art. 17.50(a), 17.46(b); (6) conversion: and (7) breach of Mexican law.

The District Court dismissed the entire complaint on the ground that the act of state doctrine barred consideration of Petitioners' claims in a United States court. The Fifth Circuit subsequently affirmed in part, reversed in part and remanded. Specifically, the Fifth Circuit reversed and remanded only that part of the complaint relating to negligent misrepresentations. The District Court has subsequently allowed Petitioners to file a

second amended complaint which articulates the purchase of financial services by Petitioners entitling them to consumer status under the Texas Deceptive Trade Practices Act.

Petitioners have continuously argued that the adjudication of their claims do not involve the adjudication of the laws, conduct or motivation of the Republic of Mexico. Indeed, the trial court's utmost deference to Mexico's exchange control regulations would not hinder, much less control, the disposition of this case on the merits. Petitioners would show that the misrepresentations and deceptive trade practices alleged in their petition occurred in El Paso, Texas and that the situs of the obligation was at all times the United States of America. However, the Fifth Circuit has suddenly abandoned situs analysis in determining applicability of the act of state doctrine. The Fifth Circuit affirmed the district court's application of the act of state doctrine, overruling situs analysis as a relevant inquiry in determining whether the doctrine should obtain.

REASON FOR GRANTING THE WRIT

The Fifth Circuit's abandonment of situs analysis in determining applicability of the act of state doctrine conflicts with the decisions of this Court and every other Circuit that has considered the issue.

The Fifth Circuit has abrogated the situs analysis this Court utilized in deciding *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682 (1976), and *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). In stark contrast to the Fifth Circuit's disregard for situs analysis, the Second Circuit in *Braka v. Bancomer S.N.C.,* 762 F.2d 222 (2d Cir. 1985) considered the situs to be of primary importance: "In reviewing the district court's conclusion on the applicability act of state doctrine, we must first determine the situs of the property that was taken by the Mexican exchange controls" *Id.* at 224. It has always been clear that "[t]he act of the state doctrine does not...bar inquiry by the courts into the validity of extraterritorial takings." *Allied Bank International v. Banco Credito Agricola,* 757 F.2d 516, 520 (2d Cir. 1985); *Citing: Banco Nacional de Cuba v. Chemical Bank New York Trust Co.,* 658 F.2d 903, 908 (2d Cir. 1981); *Republic of Iraq v. First National City Bank,* 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966).

It is important to note that the certificates of deposit purchased by Petitioners lack a contractually mandated situs. As set forth in Petitioners' complaint, purchase and repayment of the obligations occurred in the United States of America.

In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) this Honorable Court explicitly limited the act of state doctrine to takings of property "within its own territory by a foreign sovereign government." *Id.* at 428. In 1976, this Court reaffirmed that "United States courts will not give effect to foreign government confiscations without compensation of property located in the United States..." *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682, 686 (1976). Consistent with this limitation, the Fifth Circuit had previously refused to give effect to foreign acts of state that affect property whose situs was the United States. See *Maltina Corporation v. Cawy Botling Co.,* 462 F.2d 1021 (5th Cir.), *cert. denied* 409 U.S. 1060 (1972), *Callejo v. Bancomer S.A.,* 764 F.2d 1101, 1121 (5th Cir. 1985).

Since 1897, this Honorable Court's formulation of the act of state doctrine has withstood the test of time: "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another DONE WITHIN ITS OWN TERRITORY." *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897) (Emphasis added). The Fifth Circuit has now abandoned this formulation of the act of state doctrine in the case at bar reasoning that the act of state doctrine governs the dispute regardless of the situs of the debt.

A debt is an intangible asset that has no physical location. It has its situs, in the eyes of the law, wherever it can be collected. *Harris v. Balk,* 198 U.S. 215, 222-23 (1905). The situs of intangible property is about as intangible a concept as is known to the law. In general, a creditor may enforce or collect the debt wherever he can obtain jurisdiction over the debtor. *Id.* at 222-23. In the case at bar, Petitioners have successfully obtained jurisdiction over Respondent. Nevertheless, the Fifth Circuit's opinion in this case finds the act of state doctrine binding, regardless of the debt's situs:

> The Mexican government's currency control decisions plainly are beyond inquiry by this Court under the act of state doctrine: "We are barred under the act of state

> doctrine from inquiring into the validity of acts of foreign states performed in their own territory - including the validity of Mexico's exchange control regulations..." Any cause of action that is based directly on that (currency control) decision is likewise barred. (p. 4a, *infra*) [citations omitted].

The Fifth Circuit's opinion is unmistakable: any dispensation or edict emanating from a foreign sovereign can effectively excuse obligations in the United States, regardless of the debt's situs. The Fifth Circuit's opinion will long be cited for the proposition that the situs of a debt is irrelevant in determining applicability of the act of state doctrine.

CONCLUSION

The Fifth Circuit's opinion in this case constitutes a radical departure from the well-precedented situs analysis. In lieu thereof, the Fifth Circuit has created a confusing precedent, likely to generate even further confusion among the other Circuits. It is a precedent directly at odds with this Court's numerous rulings respecting the act of state doctrine. Plenary consideration of the matter by this Court is essential.

Respectfully submitted,
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By: _____
Carl H. Green
Counsel of Record
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was hand delivered to Royal Furgeson, 2000 MBank Plaza, El Paso, Texas and to Philip R. Martinez, 2000 MBank Plaza, El Paso, Texas 79901 on this the 15th day of December, 1986.

_____
Carl H. Green

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADRIAN L. GRASS, ADRIAN L. GRASS, JR., SHARON ELIZABETH GRASS AND RAMONA REBECCA LOPEZ,

Plaintiffs-Appellants,

No. 85-1669
OPINION

v.

CREDITO MEXICANO, S.A.,

Defendant-appellee.

Filed August 15, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Western District of Texas
Lucius D. Bunton, III, District Judge, Presiding

SUMMARY

BANKING AND FINANCE/INTERNATIONAL LAW

Appeal from a district court order dismissing a complaint on the ground that the act of state doctrine bars consideration of plaintiffs' claims in a U.S. court. Affirmed in part, reversed in part and remanded.

Plaintiff Grass is a citizen of the United States living in El Paso, Texas and deposited money in a bank in Mexico. In August 1982, the Mexican government froze all foreign currency accounts in Mexico and ordered that interest be paid in pesos at the official rate, rather than in dollars as Grass and the bank had agreed. When Grass was permitted access to the account, he received the principal amount in pesos, rather than in dollars, and at the offi-

cial rate rather than the market rate. The official rate was about half the market rate. This lawsuit followed.

[1] The action is not barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §1602-1611. The action arose as a result of the bank's commercial banking activities with a direct effect on the U.S. The district court therefore had subject-matter jurisdiction to consider the claims under §§1330(a), 1605(a)(2). [2] However, the Mexican government's currency control decisions are beyond inquiry by this court under the act of state doctrine. [3] The allegations of the complaint must be separated into two categories: those barred by the act of state doctrine and those not so barred. The breach of contract and conversion claims clearly call into question the validity of the Mexican government's regulations, as does the claim that the regulations are invalid under Mexican law. These causes of action thus cannot be considered due to the act of state doctrine. [4] The bank is entitled to judgment on the federal securities claims because the accounts are not "securities" within the meaning of the federal securities laws. [5] The claim of deception in violation of the Texas Deceptive Trade Practices Act (DTPA) must fail because plaintiff Grass is not a "consumer" by purchase or lease of goods or services, a prerequisite of bringing a DTPA claim, under the allegations of the complaint.

[6] The elements of a cause of action for negligent misrepresentation are set forth in the complaint: (1) the defendant, in the course of his profession, supplied false information for the plaintiff's guidance in a business transaction; (2) the defendant failed to exercise reasonable care in gathering the information; (3) the plaintiff relied on the information in a transaction the defendant intended to influence; and (4) the plaintiff thereby suffered pecuniary loss. [7] The applicability of the act of state doctrine to the negligent misrepresentation claim is not readily apparent. If on further development of the record, however, the validity of the currency control regulations is directly implicated, the district court may wish to re-examine the applicability of the act of state doctrine.

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

Plaintiffs appeal from an order of the district court dismissing their complaint on the ground that the act of state doctrine bars consideration of plaintiffs' claims in a United States court. We affirm in part, reverse in part, and remand.

I.

Plaintiff Adrian L. Grass is a citizen of the United States living in El Paso, Texas. Grass opened in 1976 a dollar account with the predecessor of defendant Credito Mexicano, S.A., a bank in Mexico. For the next six years, Grass invested more money in Credito Mexicano, usually in certificates of deposit. In August 1982, the Mexican government froze all foreign currency accounts in Mexico and ordered that interest be paid in pesos at the official rate (apparently about half the market rate), rather than in dollars as Grass and Credito Mexicano had agreed would be the case. When Grass was permitted access to the accounts in 1983, he received his principal amount in pesos, rather than in dollars, again at the official rather than market rate. This assertedly resulted in a principal loss to Grass of $210,262.96, plus lost interest.

This lawsuit followed. Plaintiffs' first amended complaint sets forth the following federal and state law causes of action: (1) sale of unregistered securities in contravention of 15 U.S.C. §77e; (2) fraudulent misrepresentations and omissions in the sale of securities, 15 U.S.C. §§77e(2), 77q(a), 78j(b); 17 C.F.R. §240.10-b5; (3) negligent misrepresentations; (4) breach of contract; (5) deceptive trade practices, Tex. Bus. & Comm. Code Ann. §§17.50(a), 17.46(b); (6) conversion; and (7) breach of Mexican law.

II.

[1] After discovery was commenced and the motion to dismiss filed, this court decided *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), which disposes of many of the issues raised. First, this action is not barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, even though Credito Mexicano is now an instrumentality of the Mexican government. As did *Callejo*, this action arose as the result of Credito Mexicano's commercial

banking activities with a direct effect on the United States, *id.* at 1107; therefore, the district court has subject-matter jurisdiction to consider the claims under 28 U.S.C. §§1330(a), 1605(a)(2). *See also Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1391 (5th Cir. 1985).

[2] However, the Mexican government's currency control decisions plainly are beyond inquiry by this court under the act of state doctrine: "We are barred under the act of state doctrine from inquiring into the validity of acts of foreign states performed in their own territory — including the validity of Mexico's exchange control regulations..." *Id.* at 1105. Any cause of action that is based directly on that decision is likewise barred. *Id.*

It is tempting to end our analysis here. Grass arguably would have suffered no injury had it not been for the Mexican government's actions. However, as we noted in *Callejo,* claims that are based on Credito Mexicano's failure to comply with the law at the time the certificates of deposit were issued, rather than on its later breach of the terms of the certificates due to its compliance with Mexico's exchange control regulations, are not barred by the act of state doctrine. *Id.* at 1125 n.33. "Adjudicating these claims would not involve reviewing the validity of the exchange control regulations." *Id. See also Riedel v. Bancam, S.A.,* 792 F.2d 587 (6th Cir. 1986) (permitting state securities law claim to proceed against Mexican bank because claim did not implicate currency control decision). However, these claims must state a cause of action as a matter of substantive law, based on the allegations of the complaint, in order to warrant reversal.

[3] Therefore, we must separate the allegations of the complaint into two categories: those barred by the act of state doctrine and those not so barred. The breach of contract and conversion claims clearly call into question the validity of the Mexican government's regulations, as does the claim that the regulations are invalid under Mexican law. We cannot consider these three causes of action due to the act of state doctrine and the principles set forth in *Callejo.*

[4] Four claims remain. Plaintiffs admit that Credito Mexicano is entitled to judgment as a matter of law on the two federal securities laws claims pursuant to the finding in *Callejo* that identical accounts "were not 'securities' within the meaning of the federal... securities laws." 764 F.2d at 1125 n.33.

[5] The claim of deception in violation of the Texas Deceptive Trade Practices Act ("DTPA") must fail because Grass is not a "consumer" by purchase or lease of goods or services, a prerequisite to bringing a DTPA claim, under the allegations of the complaint, *Kennedy v. Sale,* 698 S.W.2d 890, 892 (Tex. 1985); Tex. Bus. & Comm. Code Ann. §17.45(4) (Vernon Supp. 1985). An "attempt to acquire money" is not an attempt to acquire goods or services as contemplated by the DTPA. The mere purchase of a certificate of deposit is not a purchase of goods or services for the purposes of the DTPA. *First State Bank, Morton v. Chesshir,* 613 S.W.2d 61, 62-63 (Tex. Civ. App. — Amarillo), *rev'd on other grounds,* 620 S.W.2d 101 (Tex. 1981); *see Riverside National Bank v. Lewis,* 603 S.W.2d 169, 175 (Tex. 1980). However, a purchase of services — such as financial counseling — in connection with a purchase of a certificate of deposit may provide a basis for DTPA liability. *First Federal Savings & Loan Association of San Antonio v. Ritenour,* 704 S.W.2d 895, 899 (Tex. Civ. App. — Corpus Christi 1986, writ ref'd n.r.e.). But in the case *sub judice,* there are no allegations in the complaint that might support a conclusion that Grass purchased any services whatever from Credito Mexicano when he purchased the certificates of deposit. *Compare id.* at 899 (bank provided plaintiff with advice, counseling, and "a broad range of services"). Rather, there is here alleged nothing more than a series of purely financial transactions. Accordingly, the DTPA count fails to state a cause of action.

[6] Finally, we reach the negligent misrepresentation claim. The factual allegations of the complaint relevant to this court, which we must assume to be true, *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984), are as follows. Grass' investments were made at least sometimes in response to visits by agents from Credito Mexicano to Grass in El Paso. These agents told Grass that the investments in Credito Mexicano were a "stable and wise" investment, that Grass "had nothing to worry about" in investing in the accounts, and that the accounts were "fantastic" investments. Relying on those representations, Grass invested more money in and did not remove his funds from Credito Mexicano through August 1982. Grass asserts that the representations by Credito Mexicano's directors and agents concerning the security of the investment were made "in a reckless and negligent manner, not warranted by the information that Defendant then had concern-

ing the subject matter of the representations and omissions and without regard to whether or not they were true." As a "proximate result of the misrepresentations," plaintiffs suffered a loss of principal and interest. Credit Mexicano has at no place in its voluminous pleadings contested the sufficiency of this cause of action under Texas law. *See generally* Restatement (Second) of Torts § 552; *Rosenthal v. Blum,* 529 S.W.2d 102, 104-05 (Tex. Civ. App. — Waco 1975, writ ref'd n.r.e.)

In order to state a cause of action for negligent misrepresentations, the plaintiff must allege that: (1) the defendant, in the course of his profession, supplied false information for the plaintiff's guideance in a business transaction; (2) the defendant failed to exercise reasonable care in gathering the information; (3) the plaintiff relied on the information in a transaction the defendant intended it to influence; and (4) the plaintiff thereby suffered pecuniary loss. *Id.* at 105. These elements are set forth in the complaint. Difficulties may arise for Grass in this case in proving that the representations (even if they were false and recklessly made) were the cause of his loss. But that would seem to be a matter of proof, not of pleading.

[7] A few final words concerning the applicability of the act of state doctrine to the negligent misrepresentation count. The parties have paid virtually no attention to this count. Suffice it to say that, at this state in the proceedings, Credito Mexicano has not shown how the currency control regulations are directly implicated by consideration of the claim. On this record, we are not convinced that adjudication of the claim would "involve reviewing the validity of the exchange control regulations," *Callejo,* 764 F.2d at 1125 n.33. Rather, on its face this claim involves only an assertion that Credito Mexicano's agents, engaged in a commercial activity having effects in Texas, misrepresented these investments as safe in the months and years preceeding the government's currency decisions, when they should have known that the investments were not safe. The applicability of the act of state doctrine to this claim is not currently apparent. If on further development of the record however, the validity of the currency control regulations is directly implicated, then the district court may wish to re-examine the applicability of the act of state doctrine. At this point, however, Credito Mexicano is not entitled to judgment on the negligent misrepresentation count.

III.

For the foregoing reasons, we affirm the district court's entry of judgment in favor of Credito Mexicano on Counts, 1, 2, 4, 5, 6 and 7 of the amended complaint.The entry of judgment on Count 3 is reversed, and this case is remanded to the district court for further proceedings not inconsistent with this opinion. Each side shall bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ADRIAN L. GRASS, ADRIAN L. GRASS, JR., SHARON ELIZABETH GRASS, and RAMONA REBECCA LOPEZ	( )	No. EP-83-CA-343
vs.	( )	
CREDITO MEXICANO, S.A., a/k/a CREDITO MEXICANO, S.N.C.	( )	

ORDER

Adrian L. Grass in July 1976 opened a dollar account with the Defendant's predecessor upon the suggestion and invitation of one of the institution's directors. In 1978, the account was transferred to the Defendant, Credito Mexicano, S.A. (hereinafter, the Defendant will be referred to as Credito). From July 1976 through July 1982, Grass continued to invest dollars with Credito and received a return in dollars on the account investments. In August 1982, however, Credito informed Grass that all of his dollar accounts were frozen, and that the Mexican bank would have to pay interest on his accounts in pesos. The explanation for this lies in the fact that the Government of the Republic of Mexico issued several governmental currency decrees in 1982 to stabilize that nation's currency and stem an outflow of foreign exchange. Grass attempted to close his accounts that summer, but the Defendant informed him that his account was frozen until January 22, 1983. On February 1, 1983, Credito permitted him to close his account. The Defendant, however, paid the monies to Grass in an amount equivalent to the pesos conversion rate of exchange.

Subsequently, the Plantiffs in this cause brought this action to recover, among other things, the difference between the amount the Plaintiffs received from Credito and what they would have received had the dollar accounts been redeemed in dollars. The Defendant urged dismissal of this cause by way of motion, contending that the Defendant was an instrumentality of the

Mexican government and that it could not be sued under the Foreign Sovereign Immunities Act or alternatively, the Act of State Doctrine. This Court overruled the Motion, holding that, although Credito was an instrumentality of the Mexican government, the Defendant was not immune to suit under the commercial activities exception of the Foreign Sovereign Immunities Act. The Court also ruled that the Act of State Doctrine would not preclude the Court from adjudicating the Plaintiffs' claims.

Since that time, the United States Court of Appeals for the Fifth Circuit rendered its decision in *Callejo v. Bancomer, S.A.*, No. 84-1270 July 8, 1985, slip opinion. The Defendant now asks the Court to reconsider its prior rulings in light of *Callejo*. Both sides have briefed the issues raised in the Defendant's motion to reconsideration. The Court, after considering *Callejo*, the facts and circumstances of this case, and the briefs of the parties, is of the opinion that the Defendant's motion should be granted. Accordingly, the Court will enter an Order dismissing this cause without prejudice.

Initially, the Court notes that Plaintiffs' claims will require this Court to question the Mexican currency regulations issued by that government in the summer of 1982. Under *Callejo, supra,* this Court must decline to decide the merits of a case if in doing so, this Court would need to judge the validity of the public acts of a sovereign state performed within its own territory. *Id.* at 5298. In that connection, the Court finds that the September 1, 1982, Presidential Nationalization Decree cannot act as a general waiver provision for the adjudication of claims arising as a result of the exchange control decrees.

The remaining issue in this case is whether the alleged taking by the Defendant took place in Mexico or in the United States. In determining the situs of the dollar accounts in issue, the Court is bound by federal rather than state law. Id. at 5308, citing *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), *cert. denied,* 393 U.S. 924 (1968). The Court is also guided by the general policies of the act of state doctrine, rather than the rules developed in other contexts. *Callejo, supra,* at 5308-5309. The *Callejo* Court formulated the proper test for determining the situs for debts owed by foreign banks to American

nationals as being where the incidents of the debt, as a whole, place it. *Id.* at 5310. Relevant factors include (1) the place where the deposit is carried; (2) place of payment; (3) intent of the parties regarding the applicable law; and (4) the involvement of the American banking system in the transaction. *Id.* at 5310. The ultimate question is: "Are the ties of the debt to the foreign country sufficiently close that we will antagonize the foreign government by not recognizing its acts?" *Id.*

In the case at bar, the deposits were carried in Mexico. However, Credito paid on the account investments in El Paso, Texas, and it appears that, Adrian Grass made his investments by delivering monies to the Defendant or its agent in this country. In addition, the banking institutions of the United States were used to transfer and negotiate checks with regard to the Credito accounts. In addition to these recited facts, it should be noted that under the contract, Adrian Grass had with Credito, early withdrawal from the account was strictly prohibited. That fact and the fact that the deposits were carried in Mexico appear on the balance to indicate that the situs of the debt was Mexico. As such, the Act of State Doctrine would operate to bar this Court's adjudication of the issues raised by the Plantiffs. Therefore, this Court is without the power to hear and consider the issues underlying Plantiffs' claims. The appropriate action for this Court should be dismissal without prejudice of this cause.

IT IS, THEREFORE, ORDERED that the Motion to Reconsider filed by the Defendant be and hereby is granted.

IT IS FURTHER ORDERED that this cause be and hereby is dismissed without prejudice.

SIGNED and ENTERED this 19th day of September, 1985.

/s/ Lucius D. Bunton

UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ADRIAN L. GRASS, ADRIAN L. GRASS, JR., SHARON ELIZABETH GRASS, and RAMONA REBECCA LOPEZ	§	No. EP-83-CA-343
Plantiffs,	§	
vs.	§	
CREDITO MEXICANO, S.A., a/k/a CREDITO MEXICANO, S.N.C.	§	
Defendant.	§	

PLANITIFF'S FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Adrian L. Grass, Adrian L. Grass, Jr., Sharon Elizabeth Grass, and Ramona Rebecca Lopez, complaining of Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C., Defendant, and state:

I.

PARTIES AND JURISDICTION

Plaintiffs are residents of Texas and citizens of the United States of America. Defendant, Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C., is an alien corporation with its principal place of business located in the Republic of Mexico. The amount in controversy (exclusive of interest and cost) exceeds $10,000.00 This Court is subject matter jurisdiction pursuant to 28 U.S.C. §1331 and §1332. In the alternative, the Court has jurisdiction pursuant to 28 U.S.C. §1330, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611.

II.

SERVICE

Defendant is an alien corporation that does not maintain a regular place of business in the State of Texas and has not designated an agent upon whom service of process may be made on causes of action arising out of business done in the State. Defendant has engaged in activities which constitute doing business in the State of Texas. Defendant solicited, offered, and sold securities to and entered into contracts with Plaintiff Adrian L. Grass at Plaintiff's business office in El Paso, Texas. Pursuant to the law of the State of Texas, service of process may be made upon the Secretary of State of the State of Texas for a nonresident corporation doing business in Texas, and forwarded to Defendant at its principal place of business: Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C., Isabela Catolica #43, 3er piso, Mexico, D.F., Mexico. In the alternative, the Defendant may be served in accordance with the Foreign Sovereign Immunities Act, 28 U.S.C. §1608. Defendant has agreed that service may be accomplished by service by hand delivery upon Defendant's attorneys of record, Royal Furgeson or Philip Martinez, Kemp, Smith, Duncan and Hammond, 2000 State National Plaza, El Paso, Texas 79999-2800.

III.

STATEMENT OF THE CASE

Plaintiffs would show the Court that in 1976 Mario Lozoya Muniz, the General Manager for Inversiones Bursatiles Mexicanas, S.A., the predecessor to Credito Mexicano S.A., also known as Credito Mexicano, S.N.C., delivered information regarding investments in dollar accounts in Mexico to Plaintiff Adrian L. Grass at his office in El Paso, Texas. Subsequent to the delivery of this information, Plaintiff Adrian L. Grass had conversations with Mr. Lozoya at Dr. Grass' office in El Paso and finally began investing in July, 1976.

Plaintiff, Adrian L. Grass, since July, 1976, has invested in dollar accounts with Inversiones Bursatiles Mexicanas, S.A., and its successor, Credito Mexicano, S.A., also known as Credito Mexicano, S.N.C. These investments were typically made for six

month durations, and have been made for both the personal account of Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass, and for the Adrian L. Grass Professional Association Employee Retirement Plan, consisting of Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez. Each investment was purchased in El Paso, Texas.

On or about July 26, 1982, in El Paso, Texas, Plaintiffs purchased six month certificates of deposit from an agent of Credito Mexicano, S.A. Adrian L. Grass and Ramona Rebecca Lopez invested $280,690.62 with Defendant for the Adrian L. Grass Professional Association Employee Retirement Plan. Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass invested $141,637.25 with Defendant. These investments were made for six month period dollar accounts and yielded 15.31% annual interest.

The certificates of deposit in dollar accounts purchased by Plaintiffs from Defendant on or about July 26, 1982 were securities pursuant to 15 U.S.C. §§77 and 78. These securities were not registered with the Securities and Exchange Commission, and no prospectus was ever delivered to Plaintiffs prior to or at the time of the sale.

Prior to the sale on or about July 26, 1982, Plaintiffs specifically asked agents of Defendant, Mario Lozoya Muniz and Marta Rodriguez, on at least two occasions, whether the dollar accounts were still a stable and wise investment. Both agents of Defendant informed Plaintiffs that Defendant's dollar accounts were "fantastic," and that Plaintiffs had nothing to worry about in investing in these securities in accounts.

In August, 1982, Credito Mexicano, S.A. began to pay interest on the accounts in pesos by converting the dollars into pesos at the rate of 70.00 pesos to the dollar, an artificial rate substantially below the exchange rate in international markets, and in direct contravention of its agreement with Plaintiffs. Subsequently, Plaintiffs attempted to withdraw all money from the accounts, but were informed that the money was frozen until the expiration of the term of the Certificate of Deposit. The freeze on the account remained in effect until January 26, 1983. Plaintiffs withdrew all money from the Defendant bank on February 1, 1983. At this time, in contravention of the arguments and representations of Defendants, the dollar accounts were converted into pesos at

75.32 pesos to the dollar. Defendant's agents assured Plaintiffs that the bank would take care of converting the pesos into dollars. Subsequently, Defendant arranged to convert the pesos into dollars at an exchange rate of 150 pesos to the dollar, resulting in a tremendous loss in principal to Plaintiffs.

IV.

COUNT ONE
SALE OF UNREGISTERED SECURITIES

The acts complained of herein involve the purchase and sale of securities within the meaning of the Securities Act and were done by the use of mails and by the use of the means and instrumentalities of interstate commerce. Some of these acts took place in the Western District of Texas.

On or about July 26, 1982, Plaintiffs conferred in El Paso, Texas with Mario Lozoya Muniz, and with Marta Rodriguez, agents of Defendant Credito Mexicano S.A. These agents solicited and sold Plaintiffs the certificates of deposit in El Paso, Texas as described above.

In return for the Plaintiffs' investment of their money, Plaintiffs only had to perform ministerial functions. These investments were subject to risk in that Plaintiffs had no control over the investment and relied completely upon the expertise and judgment of Defendant Credito Mexicano, S.A.

Plaintiffs invested all the money in dollar accounts with Defendant Credito Mexicano, S.A. The investments were for a period of six (6) months, during which time Plaintiffs would be paid interest monthly at the rate of 15.31% per annum.

At all times, Defendant represented, and Plaintiffs believed, that their principal would remain constant and that interest would be paid upon this principal at the rate of 15.31% per annum. Defendant's agents represented that there was no risk to this investment and that it was safe. Defendant's agents represented that Defendant was a well established bank and that it was viable and functioning and operating successfully. Defendant's agents also represented that Plaintiffs had excellent prospects for a high return on their investments.

The certificates of deposit in which Plaintiffs invested were securities as that term is defined. The certificates of deposit invest-

ed in by Plaintiffs were securities as that term is defined by §2(1) of the Securities Act, 15 U.S.C. §77b(1). Defendant's agents personally participated or aided in the offering and sale of the aforementioned securities to Plaintiffs. Such securities were offered and sold and available for sale to the public at large by Defendant.

The aforementioned securities were offered and sold to Plaintiffs without being registered as required by §5(a) of the Securities Act, 15 U.S.C. §77e(a), and thus was in violation of the aforementioned statute. Furthermore, Defendant never provided Plaintiffs with a prospectus on the investment in these securities as required by §5(b) of the Securities Act, 15 U.S.C. §77e(b).

Subsequent to the sale of the securities, and after discovery of the false representations by Defendant's agents, Plaintiffs offered to return the securities for the return of their investment. Defendant at all times refused to return the investment. Finally, after the expiration of the six-month time period, Defendant returned the original investment to Plaintiffs after twice converting the money between currencies at artificial rates, such that Plantiffs lost almost fifty percent of their original investment. Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez initially invested $280,690.62 as the Adrian L. Grass Professional Association Employee Retirement Plan. On February 1, 1983, Defendant closed out this account by paying Plaintiffs in pesos at a conversion rate of 75.32 pesos to the dollar, and assuring Plaintiffs that this would be converted into dollars for them. However, following the Defendant's conversion of the pesos back into dollars at an exchange rate of 150 pesos to the dollar, only $140,944.13 was delivered to Plaintiffs as return of principal. This represents a loss in principal of Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez of $139,746.49.

Additionally, Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass invested $141,637.25 in a personal account with Defendant. On February 1, 1983, Defendant closed out the Plaintiffs' account by paying their principal in pesos at a conversion rate of 75.32 pesos to the dollar, and assuring Plaintiffs that said amount would be converted for them back into dollars. Upon reconversion by Defendant, only $71,120.78 was received by Plaintiffs as return of their principal. This action resulted in a loss of principal to Plaintiffs Adrian L. Grass, Adrian

L. Grass, Jr. and Sharon Elizabeth Grass in the amount of $70,516.47.

Plaintiffs additionally lost interest on their principal due to the payment of interest in pesos at artificial conversion rates of 70 pesos to the dollar, 75.32 pesos to the dollar. Additional, no interest has been paid on the lost principal since February 1, 1983.

Plaintiffs have found it necessary to retain the undersigned counsel for reasonable attorneys' fees in addition to the damages described above plus prejudgment and postjudgment interest as provided by law.

V.

COUNT TWO
FRAUDULENT MISREPRESENTATIONS AND OMISSIONS IN THE SALE OF SECURITIES

This action is brought under and pursuant to §12(2) and 17(a) of the Securities Act, 15 U.S.C. §§77 1(2), 77q(a), and §10(b) of the Exchange Act, 15 U.S.C. §78j(b), and Rule 10b-5 thereunder. Plaintiffs rely on the statement of facts and allegations of the case as cited above.

Plaintiffs allege that during the period July 1, 1982 through February 6, 1983, the exact dates being unknown to Plaintiffs because of Defendant's fraudulent concealment, Defendant engaged in the unlawful acts, transactions, practices and courses of business that operated as a fraud and deceit on Plaintiffs.

Defendant made various statements of material fact and failed to state other material facts necessary in order to make the statements made not misleading to Plaintiffs, in light of the circumstances under which they were made, all in violation of the above cited statutes and rule, the purposes and effect of which was to cause Plaintiffs to purchase certificates of deposit for excessive consideration during the period of July 26, 1983 through February 1, 1983.

The fraud practiced and devices utilized by Defendant in order to effectuate the aforesaid sale of the securities consisted of the following: false represention by Defendant and Defendant's agents, which were known to be false when made to Plaintiffs, and intentional concealment of and failure to disclose material facts in order to make the statements made, in light of the circum-

stances under which they were made, not misleading to Plaintiffs, such as:

a. Defendant failed to adequately disclose that the securities being sold were not being registered pursuant to the Securities Act;

b. Defendant failed to provide a prospectus of the securities being sold, as required by the Securities Act;

c. Defendant's agents represented that each security being sold was a safe security;

d. Defendant's agents represented that each security being sold would be a dollar account, that Plaintiffs' investment would remain in dollars; and that the principal and any increase in principal would be paid in dollars;

e. Defendant's agents failed to disclose that the assets and the investment could be frozen, so that Plaintiffs could not have access to said assets;

f. Defendant's agents failed to disclose that the assets in the investment could be converted from dollars into pesos, resulting in a loss to Plaintiffs;

g. Defendant's agents failed to disclose that the invested assets, once converted into pesos, could be reconverted into dollars, resulting in a loss of principal to Plaintiffs;

h. Defendant failed to disclose the managerial problems, and financial adversities that Defendant and the Republic of Mexico were experiencing, and that this might have an impact upon Plantiffs' investments;

i. Defendant failed to disclose that the rapid decline in the value of the peso could have an effect upon the amount of principal in Plantiffs' investments;

j. Defendant failed to disclose that the rapid decline in the value of the peso could have an effect upon the amount of interest paid on the investments;

k. Defendant and Defendant's agents represented that interest payments would be made in dollars;

l. Defendant failed to disclose that there were any risks involved in the investments; and

m. Defendant failed to disclose that it could impose artificial conversion rates between pesos and dollars which would adversely affect the Plantiffs' investments.

By reason of the aforementioned fraudulent acts, Plaintiffs, Adrian L. Grass and Ramona Rebecca Lopez, through the Adrian L. Grass Professional Association Employee Retirement Plan, invested $280,690.62 in a six-month certificate of deposit on or about July 26, 1982, and Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass personally invested $141,637.26 in a certificate of deposit with Defendant on or about July 26, 1982. On February 1, 1983, Defendant allowed Plaintiffs to withdraw principal from the accounts to close out their accounts. However, Defendant converted the principal amount in both accounts into pesos at an exchange rate of 75.32 pesos to the dollar, and assured Plaintiffs that this would be reconverted to Defendant into dollars. Subsequently, agents of the Defendant converted the pesos into dollars at an exchange rate of 150 pesos to the dollar. At this time, Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez received $140,944.13 in principal from the Adrian L. Grass Professional Association Employee Retirement Plan account, and Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass received $71,120.78 in principal from their personal account. Accordingly, Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez have suffered loss in the amount of $139,746.49 plus interest. Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass suffered damages in the amount of $70,516.47 plus interest. All of these damages resulted directly from the fraudulent acts of Defendant and Defendant's agents. In addition to these damages, Plaintiffs are entitled to recover reasonable attorney's fees and pre-judgment and post-judgment interest as provided by law.

VI.

COUNT THREE
NEGLIGENT MISREPRESENTATION

Plaintiff realleges and relies upon the statement of facts and representations and failures to disclose as above alleged.

The aforementioned representations and omissions were made by Defendant and Defendant's agents in a reckless and negligent manner, not warranted by the information that Defendant then had concerning the subject matter of the representations and omissions and without regard to whether or not they were true.

As a direct and proximate result thereof, Plaintiffs invested money with Defendant as referred to above. As a direct and proximate result of the misrepresentations, Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez have suffered a loss of principal in the amount of $139,746.49 plus interest, and Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass have suffered loss of principal in the amount of $70,516.47 plus interest.

VII.

COUNT FOUR
BREACH OF CONTRACT

Plaintiffs reallege and rely upon the statement of facts as referred to above.

On or about July 26, 1982, Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass personally invested $141,637.25 in a certificate of deposit with Defendant for a period of six (6) months with interest to be paid at the rate of 15.31% per annum, paid monthly. Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez also invested $280,690.62 in a certificate of deposit with Defendant on or about July 26, 1982, for a period of six (6) months with interest to be paid at the rate of 15.31% per annum, paid monthly. Both certificates of deposit were in dollar accounts, were purchased in dollars, and Defendant contracted to pay principal and interest in full to Plaintiffs in dollars.

Defendant froze both accounts so that Plaintiffs could not withdraw the funds. Subsequently, all interest payments were converted from dollars into pesos at an artificial rate such that Plaintiffs were subjected to losses of interest in both accounts.

Defendant refused to allow Plaintiff to withdraw the month until January 26, 1983. At the time of withdrawal, the principal amounts were converted from dollars into pesos, at a rate causing Plaintiffs losses of principal. Defendant arranged to reconvert pesos into dollars at the rate of 150 pesos to the dollar after originally converting the dollars into pesos at the artificial rate of 75.32 pesos to the dollar.

As the direct result of Defendant's breach of contract, Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass were damaged by a $70,516.47 reduction in principal, plus loss of interest. Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez also were damaged in the amount of a $139,746.49 reduction in principal, plus loss of interest. Additionally, interest from both accounts was paid at artifically low rates due to conversion of dollars into pesos, resulting in losses to Plaintiffs. In addition to these damages, Plaintiffs seek and are entitled to reasonable attorneys' fees, pre-judgment interest and post-judgment interest as provided by law.

COUNT FIVE
DECEPTIVE TRADE PRACTICES

Plaintiffs, as consumers, would show that Defendant's actions, as specified above constitute a violation of Texa. Bus. & Comm. Code Ann. art. 1750(a)(1), art. 17.46(b)(5)(7)(9)(14)(23), art. 17.50(a)(2) and art. 17.50(a)(3), in that:

1. Defendant represented that goods or services had sponsorship or approval, characteristics, ingredients, uses, benefits, or quantities which they did not have;

2. Defendant represented that goods or services were of a particular standard, quality or grde, or that goods were of particular style or model, if they were of another;

3. Defendant advertised goods or services with intent not to sell them as advertised;

4. Defendant misrepresented the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

5. Defendant failed to disclose information concerning goods or services which were known at the time of the transaction, and such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would

not have entered had the information been disclosed;

6. Defendant breached the express warranty that the accounts would be maintained as dollar accounts and that the principal amounts would not be depleted;

7. Defendant breached the express warranty that interest on the accounts would be paid in dollars, as would the principal; and

8. Defendant's actions, as specified above, constitute unconscionable actions or courses of action.

Defendant's violations of the Texas Deceptive Trade Practices - Consumer Protection Act, as hereinabove stated, are the producing and direct cause of actual damages to Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr., and Sharon Elizabeth Grass in the amount of $70,516.47, and to Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez in the amount of $139,746.49, plus lost interest on both accounts. Defendants, on October 19, 1983, were requested in writing to pay Plaintiffs their actual damages. Plaintiffs, pursuant to the Texas Deceptive Trade Practices - Consumer Protection Act, therefore seek recovery of actual damages as above-specified, plus costs of court, and reasonable attorneys' fees. Plaintiffs would show the Court that Defendant's actions, as hereinabove specified, were committed knowingly, and therefore, Plaintiffs are entitled to recover three times the amount of actual damages as provided in the Texas Deceptive Trade Practices - Consumer Protection Act.

IX.

COUNT SIX
CONVERSION

Plaintiffs reassert and incorporate the allegations as stated above. Plaintiffs purchased two certificates of deposit with Defendant on or about July 26, 1982. Such certificates of deposit were for dollar accounts with Defendant. Defendant has been in possession of and responsible to Plaintiffs for the value of the certificates of deposit as detailed above, since July 26, 1982. On February 1, 1983, Plaintiffs surrendered their certificates of deposit to Defendant and requested return of their principal. Defendant failed and refused to return the balance of the accounts in dollars, and instead converted the accounts into pesos at an artificial of 75.32 pesos to the dollar. This conversion resulted in the

return of only $71,120.78 to Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass, although originally $141,637.25 had been delivered to Defendant. This conversion also resulted in the return of only $140,944.13 to Plaintiffs Adrian L. Grass, and Ramona Rebecca Lopez, although originally $280,690.62 had been delivered to Defendant. Additionally, Plaintiffs have lost interest on all amounts deposited due to the conversion of interest by use of an artifically low conversion rate.

Plaintiffs have duly requested return in full of the balances of their certificates of deposit, but Defendant has not done so. Plaintiffs have been deprived of the use of this property since July 26, 1982.

Plaintiffs would further show that Defendant's conversion of their property was commited with malice and wanton disregard of Plaintiffs' rights respecting such property. Plaintiffs would also show that Defendant was notified by mail as to the rights of Plaintiffs regarding said property, but have ignored Plaintiffs' rights in clear and intentional violation of the contract executed by Plaintiffs. Therefore, Plaintiffs seek exemplary damages from Defendant in the amount of $700,000.00, or alternatively, an amount permitted by law. Plaintiffs also seek attorneys' fees as permitted by law.

X.

COUNT SEVEN
BREACH OF CONTRACT AND BREACH OF DUTY OBLIGATIONS UNDER MEXICAN LAW

Plaintiffs incorporate all allegations hereinabove stated.

Defendants assert that they are entitled to Sovereign Immunity or to dismissal pursuant to the Act of State doctrine due to governmental decrees entered by the Republic of Mexico on August 13, 1982 and September 1, 1982. Plaintiffs would show the Court that said decrees are unconstitutional under Mexican law, and accordingly, Defendant's actions may not be explained by governmental action of the Republic of Mexico. Accordingly, Defendant has breached all duties owed to Plaintiffs under the decree and under Mexican law.

This First Amended Original Complaint shall serve as written notice of the Plaintiffs' intention to raise an issue concerning the

law of a foreign country, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.

Alternatively, if the decrees of the Republic of Mexico are held to be constitutional under Mexican law, Plaintiffs would show the Court that Defendant has violated the provisions of the decrees, and accordingly, has breached its contract with Plaintiffs, and have breached all duties and obligations owed to Plaintiffs. Specifically, Plaintiffs would show that pursuant to the banking nationalization decree entered by President Jose Lopez Portillo on September 1, 1982, the Republic of Mexico asserted:

> "The measure does not bring damage at all to the creditors of the expropriated institutions, since the Federal Government, when assuming the responsibility of such public service rendering, guarantees the amortizations of the operations contacted by such institutions;
>
> "With the support of the banking legislation, the execution power, through the Treasury Department will take necessary steps for the proper organization and functioning of the new scheme of credit service, so as not to effect the rendering thereof, *in no way damaging the present rights of both the banking employees, users of the service, and creditors of the institutions.*" (Emphasis added.)

Further, the decree provides in Article 4 that "the Federal Executive will guarantee the payment of all and each the loans payable by the institutions referred to in this decree." Additionally, Article 5 provides that "the following are not subject to expropriation: monies and securities owned by users of the public bank and credit system."

Additionally, on September 1, 1982, the Republic of Mexico entered a decree establishing the generalized exchange control. This decree provides that "the debts in foreign coin or currency, contracted within or outside of the Republic, in order to be fulfilled in foreign currency, will be paid off by delivering the equivalent in national currency."

Defendant has violated such decrees in that Plaintiffs have sustained loss due to conversion of their dollar accounts into pesos, and did not receive equivalent amounts of pesos for the dollars converted. These breaches of contract and duties and obligations

under Mexican law resulted in losses to Plaintiffs Adrian L. Grass, Adrian L. Grass, Jr. and Sharon Elizabeth Grass in the amount of $70,516.47, plus loss of interest, and to Plaintiffs Adrian L. Grass and Ramona Rebecca Lopez in the amount of $139,746.49, plus loss of interest. Additionally, interest from both accounts was paid at artifically low rates due to conversion of dollars into pesos, in violation of said decrees, resulting in losses to Plaintiffs.

XI.

FOREIGN SOVEREIGN IMMUNITIES ACT

In the alternative, and without waiving the foregoing, Plaintiffs would show that the Defendants have alleged that they are subject to the Foreign Sovereign Immunities Act inasmuch as they are allegedly an instrumentality of the Republic of Mexico. Plaintiffs assert that Defendants are not immune from the jurisdiction of the courts of the United States inasmuch as they have expressly or impliedly waived their immunity from prosecution for the claims asserted by Plaintiff herein as provided by 28 U.S.C. §1605(a)(1). Further, Defendants are not immune from the jurisdiction of the Courts of the United States inasmuch as this action is based upon a commercial activity carried on in the United States, or upon an act outside the territory of the United States in connection with a commercial activity of the alleged foreign state elsewhere and which act has caused a direct effect in the United States, as provided by 28 U.S.C. §1605(a)(2). Additionally, this case involves rights in property taken in violation of international law, and that property, or property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the Defendant, as provided in 28 U.S.C. § 1605(a)(3). Further, Plaintiff would show the Court that Defendants are not immune from jurisdiction of the Courts of the United States as this action seeks money damages for loss of property occurring in the United States and caused by the tortious acts or omissions of Defendant, its agents, officers, and employees all acting in the scope of their employment. Plaintiffs are entitled to all damages enumerated herein pursuant to the provisions of the Foreign Sovereign Immunities Act.

XII.

EXEMPLARY DAMAGES

The wrongs inflicted upon Plaintiffs by Defendant as referred to above were aggravated by that kind of willfulness, wantoness, malice or gross negligence for which the law allows the imposition of exemplary damages. Defendant acted with gross indifference to the rights of Plaintiffs. Plaintiffs, therefore, seek exemplary damages in the sum of $700,000.00. Alternatively, Plaintiffs are entitled to treble damages as permitted by the Texas Deceptive Trade Practices - Consumer Protection Act.

XIII.

Additionally, due to the breach of contract, breach of securities laws of the United States, and violations of the Texas Deceptive Trade Practices - Consumer Protection Act, Plaintiffs are entitled to recover reasonable attorneys fees for prosecution of their claims. Plaintiffs have retained the services of the law firm of Grambling & Mounce to prosecute their claim and have promised to pay a reasonable attorneys' fee.

Additionally, Plaintiffs anticipate that in the event of a judgment in this cause, the judgment will require enforcement through the judicial system in the Republic of Mexico. Accordingly, Plaintiffs are entitled to recovery of all costs due to enforcement of the judgement in Mexico including attorneys' fees.

XIV.

Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs hereby demand a jury trial in this action.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendant be cited to appear and answer herein, and that upon final trial of this matter, Defendant be held liable for damages in the amount of $210,262.96, representing loss of principal to both accounts, plus interest on this amount at the rate of 15.31% from July 26, 1982 less interest actually paid through February 1, 1983, together with pre-judgment and post-judgment interest at the highest rates provided by law, exemplary damages in the amount set forth above, or alternatively, treble

damages as provided by the Texas Deceptive Trade Practices - Consumer Protection Act, reasonable attorneys' fees, costs of court, costs of enforcement of the judgment in Mexico, and such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,
Adrian L. Grass,
Adrian L. Grass, Jr.,
Sharon Elizabeth Grass, and
Ramona Rebecca Lopez

By _____
Carl H. Green

By _____
J. Scott Howard

Attorneys for Plaintiff

OF COUNSEL:

GRAMBLING & MOUNCE
P.O. Drawer 1977
El Paso, Texas 79950
(915) 532-3911

CERTIFICATE OF SERVICE

I, Carl H. Green, certify on this the 10th day of August, 1984, a true and correct copy of the foregoing document was hand delivered to Royal Furgeson, P.O. Drawer 2800, El Paso, Texas 79999-2800 and Philip R. Martinez, P.O. Drawer 2800, El Paso, Texas 79999-2800.

_____
Carl H. Green

1266R

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1669

ADRIAN L. GRASS, ADRIAN
L. GRASS, JR., SHARON
ELIZABETH GRASS and
RAMONA REBECCA LOPEZ,
Plaintiffs-Appellants,

versus

CREDITO MEXICANO, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(September 15, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Deneen Randall